

The Honorable Marc L. Barreca
Chapter 11
Hearing Location: Seattle, Washington
Hearing Date/Time: November 18, 2021 at 9:30 AM
Response Due: November 10, 2021

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

In re:

TIMOTHY DONALD EYMAN,

Debtor.

NO. 18-14536-MLB

STATE OF WASHINGTON'S MOTION
TO ENFORCE DEFAULT PROVISIONS
AND APPOINT A CHAPTER 11
TRUSTEE AND RECORD JUDGMENT

I. RELIEF REQUESTED

The State of Washington requests that a Chapter 11 trustee be appointed pursuant to the default provisions of the Chapter 11 Plan of Reorganization, Dkt. #270 (Plan) and that the State be allowed to record and perfect the judgment entered in *State v. Eyman*, Thurston County Superior Court, Case No. 17-2-01546-34, in Snohomish and King Counties. This motion is being made in anticipation of Debtor Eyman remaining in default as of October 30. It is being filed now in order to set it for November 18, the Court's next available date on its motions calendar. The State will strike this motion should Debtor Eyman make timely payment to cure default.

II. STATEMENT OF FACTS

A. Notice of Default

On September 15, 2021, Timothy Eyman failed to make his September 2021 \$10,000 monthly payment under the bankruptcy plan. As of the filing of this motion, this payment is still

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1 outstanding and Debtor Eyman has also failed to make his October 2021 payment, which like
2 his September payment was required to be mailed to the State by the 15th of the month under
3 Section 6.09 of the plan. Plan, Section 6.09 Disbursing Agent, pg. 8.

4 The State made every effort to confirm that Debtor Eyman made the September payment.
5 On September 13, 2021, State's counsel emailed Debtor Eyman's counsel to confirm the
6 monthly transfer was made to the claims reserve account and the September check would be
7 mailed to the State. On September 17, State's counsel again sought to confirm this information.
8 On September 22, 2021, when the State had still not received the check, State's counsel sent a
9 follow up email. On September 23, 2021, Debtor's counsel forwarded a photo of a check and a
10 stamped envelope that was addressed to the State, but with no postmark. The check has never
11 been received. Edison Declaration, (Edison Decl.) Ex. 1.

12 On September 30, 2021, the State issued a Notice of Default under Section 9.01 of the
13 Plan's default provision. Edison Decl. Ex. 2. Debtor Eyman was given 30 days to cure default,
14 which expires on October 30, 2021. Plan, Section 9.01 Default, pg. 11. Since issuing this notice
15 of default, the State has not been contacted by the Debtor or his counsel. Debtor Eyman has also
16 failed to file his post-confirmation report that was due on October 21, 2021. Edison Decl.
17 Therefore, the State is moving to enforce the default provisions of the Plan, should it not receive
18 the outstanding payments by October 30. The last post-confirmation quarterly report filed by
19 Debtor Eyman on June 30, 2021 indicated that he had a combined \$52,415 total in three bank
20 accounts. Chapter 11 Post-confirmation Report, Dkt. # 348.

21 **B. Section 9.01 Default Remedies under the Bankruptcy Plan**

22 Under the Plan, if Debtor Eyman fails to cure default within 30 days of service of a Notice
23 of Default, all amounts under the Plan become "immediately due and payable" and the "state
24 rate of 12% per annum" applies to "any present or future amount owed on the State's claims."
25 Plan, Section 9.01 Default, pg. 12. Therefore, the State's claim will become immediately due
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1 and payable if Debtor Eyman does not cure default by October 30, 2021, and 12% interest will
2 begin to accrue on the claim.

3 The default provision of the Plan states that “by motion of any interested party, an order
4 appointing a Chapter 11 Trustee may be entered, who shall have the rights, powers and duties
5 specified in 11 USC §§1104, 1106 and 704 (as made applicable by §1106) to make distributions
6 under the terms of the confirmed plan and administer Estate assets, including, but not limited to,
7 liquidating [the house] and distributing Debtor’s interest therein to unpaid Class I claims.” Plan,
8 Section 9.01 Default, pg. 11.

9 The default provision also provides that the State “may proceed against the Debtor and/or
10 the assets of the Debtor and/or of the Estate using any state or federal remedies without need for
11 resort to the bankruptcy court for relief from the automatic stay and without being deemed to
12 have violated the terms of this Plan, the confirmed order or the Code.” The Affected Creditor
13 may enforce its rights in state court or in bankruptcy court. Plan, Section 9.01 Default, pg. 11.
14 Therefore, if default is not cured, the State is entitled to pursue collections against Debtor Eyman
15 in state court without permission of this Court.

16 **III. REMEDIES REQUESTED UNDER THE CHAPTER 11 PLAN**

17 In anticipation of Debtor Eyman being in default the State is requesting that a Chapter
18 11 trustee be appointed pursuant to the default provision of the Plan. The State is also requesting
19 permission to record the judgment in *State v. Eyman* in Snohomish and King Counties.

20 **A. The State Requests a Chapter 11 Trustee be Appointed**

21 Under the terms of the Plan, the State can move to have a Chapter 11 trustee appointed
22 if the default is not cured. Therefore, the State is requesting that a Chapter 11 trustee be appointed
23 to administer the estate and determine the basis for Debtor Eyman’s failure to make plan
24 payments and the feasibility of the payments resuming. Even if the Plan’s default provisions did
25 not support appointment of a trustee, Debtor Eyman’s failure to make his monthly payment
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1 would make appointment of a trustee appropriate. Under 11 USC §1104, appointment of a
2 trustee is appropriate for “cause” or when appointment is in the “interests of creditors.”

3 **1. There is Cause to Appoint a Trustee**

4 Appointment of a Chapter 11 trustee is mandatory if the Court finds there is “fraud,
5 dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current
6 management.” 11 U.S.C. § 1104(a)(1) and *In re Oklahoma Refining Co.*, 838 F.2d 1133, 1136
7 (10th Cir. 1988). A Chapter 11 debtor is a fiduciary “obligated to protect and conserve property
8 in its possession, as well as to provide voluntary and honest disclosure of financial information.”
9 *In re Sal Caruso Cheese, Inc.*, 107 B.R. 808, 817 (Bankr. N.D.N.Y. 1989). As a fiduciary of its
10 creditors, a debtor in possession must act in the interests of creditors. *In re Sharon Steel Corp.*,
11 86 B.R. 455, 457 (Bankr.W.D.Pa. 1988). The debtor in possession also has a duty of
12 accountability and segregation of funds. *In re Bibo*, 76 F. 3d 256, 257-58 (9th Cir. 1996) and *In*
13 *re Federal Roofing Co., Inc.*, 205 B.R. 638, 643 (Bankr. N.D. Ala. 1996) (citation omitted).

14 Based upon these factors, Debtor Eyman’s failure to make payments establishes “cause”
15 to appoint a trustee. Debtor Eyman is obligated to protect and conserve the property of the estate
16 and be accountable to the creditors. His failure to make two plan payments without explanation
17 violates these duties and appointment of a trustee is appropriate.

18 **2. Appointment of a Chapter 11 Trustee is in the Interests of Creditors**

19 Appointment of a Chapter 11 trustee is also appropriate because it is in the interest of the
20 creditors since Debtor Eyman has stopped making monthly payments. Section 1104(a)(2)
21 creates a “flexible standard and allows the appointment of a trustee even where no cause exists.”
22 *In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 168 (Bankr. S.D.N.Y. 1990) (citation omitted). It is
23 sufficient that the appointment be in the interests of creditors. *In re Oklahoma Refining*, 838
24 F.2d at 1136 (citation omitted) and *In re Sharon Steel Corp.*, 871 F.2d 1217, (3rd Cir. 1989).
25 Factors courts consider in appointing a trustee include (a) the debtor’s trustworthiness; (b) past
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1 and present performance and chance of rehabilitation; (c) creditors' confidence in the debtor's
2 present management; and (d) the benefits of appointing a trustee balanced against the costs. *In*
3 *re Ionosphere Clubs, Inc.*, 113 B.R. at 168.

4 Debtor Eyman's unwillingness to be transparent in his financial dealings and his decision to
5 simply stop making payments without explanation requires appointment of a trustee. It is in the
6 interests of the creditors to have a trustee manage the estate, determine the reason for Debtor
7 Eyman's failure to make the required payments when his last quarterly reporting establishes that
8 he has the funds to make these payments, and if necessary, distributing assets.

9
10 **B. The State Should be Allowed to Record its Judgment from Thurston County
Superior Court, Case no. 17-2-01546-34, in Snohomish and King Counties**

11 Under the Plan, when there is a default, the State is entitled to pursue remedies in state
12 court without permission of this Court. However, since this Court previously denied the State's
13 request to file an abstract of the judgment in *State v. Eyman* in Snohomish County where Debtor
14 Eyman owns real property commonly known as 11913 59th Ave W, Mukilteo, WA 98275 and
15 claims a homestead exemption,¹ in an abundance of caution, the State is renewing its request to
16 record its judgment in state court. This is necessary to protect the State's interest in the Eyman
17 home and preserve the bankruptcy estate. Additionally, the State is requesting to record its
18 judgment in King County since Debtor Eyman currently resides in King County and may have
19 assets in King County now or in the future.

20 In Washington, a judgment becomes a lien upon the real property of the judgment debtor,
21 but only in the county in which the judgment is recorded. Wash. Rev. Code §§ 4.56.190, .200(2)
22 (2011). An abstract of the judgment may be filed with the county clerk and the recording officer
23 of the county in which the judgment debtor's real property is situated in order to commence a
24 lien on the property or the value thereof exceeding the homestead exemption. Wash. Rev. Code
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26 ¹ Schedules A and C filed together with Debtor's Voluntary Petition, Docket. # 1, pgs. 14 and 23.

1 § 4.56.200(3) (2011); Wash. Rev. Code § 6.13.090 (2007) and *In re Deal*, 85 Wash. App. 580,
2 585-586, 933 P.2d 1084, 1087. Accordingly, if the Court allows the recording of the State's
3 judgment, then the State will have priority over any future attempt by Debtor's counsel, or any
4 other creditor, to encumber the Eyman home. Washington's recording system ensures that
5 "generally, liens take precedence in order of time, the first in time being the first in right." *Seattle*
6 *Mortg. Co. v. Unknown Heirs of Gray*, 133 Wash. App. 479, 495, 136 P.3d 776, 785 (2006)
7 citing *Bank of Am. v. Wells Fargo Bank*, 126 Wash. App. 710, 714, 109 P.3d 863 (2005) (quoting
8 *Hollenbeck v. City of Seattle*, 136 Wash. 508, 514, 240 P. 916 (1925)). Therefore, the State
9 requests this Court's permission to record the judgment in Snohomish and King Counties.

10 In conclusion, Debtor Eyman will be in default under the Plan if he does not cure default
11 by October 30, 2021. Should he fail to make timely payment, the State is entitled to the default
12 remedies under the Plan. Consequently, the State requests that a Chapter 11 trustee be appointed
13 and that the State be allowed to record the judgment in *State v. Eyman*.

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15 RESPECTFULLY SUBMITTED this 28th day of October, 2021.

16 ROBERT W. FERGUSON
17 Attorney General

18 /s/ Susan Edison

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